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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 238

COMMONWEALTH OF PENNSYLVANIA

v.

E. W. STERLING GRAHAM, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATUTE

Pennsylvania Securities Act of 1939, P. L. 748 as re-enacted in the Act of 1949, July 10, P. L. 317, 70 P.S. Sec. 31 et seq. 2

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner, E. W. Sterling Graham, respectfully petitions for a Writ of Certiorari to review a decision of the Supreme Court of the Commonwealth of Pennsylvania rendered April 10, 1962, which denied Allowance of Appeal in criminal proceedings instituted in the Court of Quarter Sessions of the Peace of Allegheny County, Pennsylvania.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Defendants in this case were indicted for violation of the Pennsylvania Securities Act of 1939; P.L. 748 as re-enacted in the Act of 1949, July 10, P. L. 317, 70 P. S. Sec. 31 *et seq.* The case was tried before the Court of Quarter Sessions of the Peace of Allegheny County, Pennsylvania, without a jury. At the conclusion of the Commonwealth's case, the Court sustained defendant's demurrer to Counts 2 and 3 of the indictment, and upon a conclusion of the trial and after a study of the transcript, found the defendant, E. W. Sterling Graham, guilty on Count 1 of the indictment and the defendant, Susan P. Graham, not guilty.

The first count of the indictment charges the defendants with fraud or fraudulent practices as defined in Section 2, subsection (i) of the Securities Act (R. 3a). As stated in the lower Court's opinion, the essence of the charge is that the defendant dealers fraudulently created a market for stock in a certain company known as Hard Rock Mining Company, not sanctioned by the Securities and Exchange Commission of the United States, and thereafter sold and delivered to various persons more than five hundred thousand (500,000) shares of such stock, receiving as compensation therefor profits and commissions so gross and exorbitant as to be unconscionable and fraudulent.

An appeal to the Superior Court of Pennsylvania was taken from the discharge of a Rule to Show Cause why judgment should not be arrested and from the discharge of a Rule to Show Cause why a new trial should not be granted.

On December 14, 1961, the judgment of sentence of the lower court was affirmed by the Superior Court on the basis that the six judges who heard the argument of the appeal were equally divided in opinion.

On January 15, 1962, Petitioner filed with the Supreme Court of Pennsylvania at No. 2392A Miscellaneous Docket, a Petition for Allowance of Appeal, which Petition was denied on April 10, 1962.

No evidence was offered and no showing was made that defendant received profits and commissions so gross and exorbitant as to be unconscionable and fraudulent (R. 245a). The trial court's finding was that defendant engaged in a scheme to sell worthless securities, and that, *ipso facto*, any profit or commission was gross and exorbitant (R. 326a). The indictment did not charge defendant with a scheme to sell worthless stock.

B.

STATEMENT DISCLOSING BASIS OF JURISDICTION

1. Jurisdiction is invoked under 28 U. S. C., Sec. 1257(3).

2. The judgment of the Superior Court of Pennsylvania was entered December 14, 1961. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, timely filed, was denied April 10, 1962.

3. The nature of the case has been stated (ante, p. 2) Upon argument of the motions in arrest of judgment and for a new trial Petitioner asserted the conviction of an offense not charged in the indictment, and that the indictment was so vague and indefinite as not to

apprise Petitioner of the offense charged. The trial court denied the motions (R. 253a). Upon review by the Pennsylvania Superior Court, Petitioner reasserted these contentions as a denial of his constitutional rights under the Fourteenth Amendment to the United States Constitution. The affirmance of the conviction by the Superior Court of Pennsylvania was based upon the six judges who heard the argument being equally divided in opinion (post, p. 1, Appendix).

4. The conclusion of the Pennsylvania Court that no fatal variance existed between the indictment and proof, and that the indictment adequately informed the Petitioner of the charges he was required to meet at trial, presents for determination a substantial question relating to a denial to Petitioner of due process. The conclusion reached by the Pennsylvania Court is at variance with principles announced by this Court.

5. The following cases are believed to sustain jurisdiction: *De Jonge v. Oregon*, 229 U. S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278; *Stromberg v. California*, 283 U.S. 359, 367, 368, 51 S. Ct. 532, 535 75 L. Ed. 1117 73 A. L. R. 1484.

C.

QUESTIONS PRESENTED

Broadly stated, the question presented is this:

Does the conviction unlawfully deprive Petitioner of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

Stated more specifically:

1. Where Petitioner has been convicted of engaging in a scheme to sell worthless securities on the trial of an indictment charging only a fraudulent scheme to sell securities and thereby realize profits and commissions so gross and exorbitant as to be unconscionable and fraudulent, is there a fatal variance between indictment and proof?

2. Was the indictment so vague and indefinite that it failed to fairly apprise the Petitioner of the charges he was required to meet at trial?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The indictment itself is vague and indefinite. It comprises several pages and the confusion created by its verbosity, vagueness and indefiniteness is evident from the opinion of the trial court (R. 241a-253a), in which much space is devoted to an explanation of the indictment.

2. In spite of the verbosity and vagueness of its language, the Court condensed the meaning of the indictment: "in substance the defendants were charged with having committed fraud or fraudulent practice as defined in Section 2, subsection (i) of the Securities Act in fraudulently creating a market for stock in a certain company known as Hard Rock Mining Company, not sanctioned by the Securities and Exchange Commission of the United States and thereafter selling and delivering to various persons 524,320 shares of said stock and receiving profits and commissions so gross and exorbitant as to be unconscionable and fraudulent." The Court itself found however, that the commissions and profits were reasonable and in accord with good brokerage practice (R. 245a).

The trial court concluded that if the defendant engaged in a scheme to sell securities which he knew were worthless, he would, *ipso facto*, be guilty of [redacted] gross and exorbitant profits as commissions. But even proof beyond a reasonable doubt that the stock was worthless cannot support, under the law, a finding, as charged in the indictment, that defendant schemed to receive exorbitant profits. As is apparent from the trial courts

opinion, a finding that defendant knowingly schemed to sell worthless stock is essential to a conviction under the statute. But no such charge is contained in the indictment, and, had the securities not been worthless, no crime could be found to have been perpetrated.

Where, as here, the variance is material, as where it misleads the accused in making his defense or exposes him to the danger of being again put in jeopardy for the same offense, the variance is fatal to a conviction. *Commonwealth v. Aurich*, 342 Pa. 282, 19 A. 2d 920 (1941); *Commonwealth v. Beckwith*, 36 D. & C. 687, 88 P.L.J. 198 (1940); *United States v. Wills*, 36 F. 2d 855 (1930).

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supeme Court of the State of Pennsylvania, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of said Supreme Court of Pennsylvania be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated July 9, 1942.

C. Sterling Deacon
Petitioner

By Joseph P. Schneider, Jr.
Paul Gerstung
Counsel for Petitioner

No. 132

APPENDIX

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
v.
E. W. STERLING GRAHAM,
Appellant

No. 170
April Term,
1961

Appeal from Judgment of Sentence of the Court of Quarter Sessions of the Peace for the County of Allegheny at No. 735 June Term, 1958.

Filed: December 14, 1961.

PER CURIAM:

The six Judges who heard the argument of this appeal being equally divided in opinion, the judgment of sentence of the lower court is affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
v.
E. W. STERLING GRAHAM, Petitioner

No. 2398A Miscellaneous Docket

ORDER

April 10, 1962 Petition denied Per Curiam.

Filed January 15, 1962